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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. [redacted] 24

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

J. BERRY KING,
Attorney General of Oklahoma,
F. M. DUDLEY,
W. T. CLEETON,
ED. WAITE CLARK,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 845

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

MAY IT PLEASE THE COURT:

The appellee, in support of its assertion of belief that there exists in the above entitled case no grounds

of jurisdiction for review by this court, and also for grounds of dismissal, respectfully represents:

Jurisdiction of review is sought to be established by appellant, on the grounds of Section 237 of the Judicial Code, as amended (28 U. S. C. A., Sec. 344), quoted under "A" of appellant's statement, as follows:

> "* * * Where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Oklahoma Statute asserted (under "B" of appellant's statement) to have been drawn in question on the ground of its being repugnant to the Constitution of the United States, is Section 9574, Compiled Oklahoma Statutes of 1921; which reads as follows:

> "All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

Relief under Section 237 of the Judicial Code is sought upon the theory, as set out on page six of appellant's statement, that this Court will accept the interpretation placed upon the Oklahoma statute by the Supreme Court of Oklahoma; and that the Supreme Court of the State of Oklahoma has interpreted Section 9574, C. O. S. 1921, in such a manner as to make it contravene the 14th Amendment of the

Constitution of the United States; thus giving this Court jurisdiction.

Under this doctrine, this Court is asked to "read into the Statute" the interpretation of the Oklahoma Supreme Court:

> Citing: *Knights of Pythias* v. *Meyer*, 265 U. S. 30; *Appleby* v. *New York*, 271 U. S. 364; *Ward & Gow* v. *Krinsky*, 259 U. S. 503; *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494; *Alabama Railway Co.* v. *Kentucky*, 274 U. S. 76, and other cases referred to but not discussed.

Under the cases cited by appellant to the effect that this Court will accept the State court's interpretation of a State statute, it is apparent that this Court will look only to that interpretation, as shown by the decision of the State court.

Inasmuch as this Court will not, for purposes of determining jurisdiction, review the State court's determination as to the *facts* in the case a review of contentions in the State court as to the facts has no place in this statement.

The Supreme Court of Oklahoma, in its decision of December 20, which is set out in full, attached hereto, marked Exhibit "A", after reciting that no *ad valorem* tax was paid on the cars in Illinois, the domicile of the Company, uses the following language:

> "Section 9574, C. O. S. 1921 (C. O. S. 1931, Sec. 12317), provides:
>
> " 'All property in this state, whether real or personal, including the property of corpora-

tions, banks and bankers, except such as is exempt, shall be subject to taxation.'

"A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

"The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years, it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation owns but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. *Travis* v. *Dicky,* 96 Ok. 256, 222 Pac. 527. *State* v. *Timbrook's Est.,* (La.) 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Okla. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. *Gulf Ref. Co.* v. *Tillinghast,* (Mo. App.) 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute 'property within the State'. They are merely temporarily absent at times from Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars is taxable in Pawnee County. *Prairie Cattle Co.* v. *Williamson,* 5 Ok. 488, 49 Pa. 937."

In holding no cars taxable in Osage County, the Court further said:

> "In our opinion these cars did not have a permanent abiding place within Osage County, and were not subject to taxation otherwise than in Pawnee County."

As we conceive it, the above is the interpretation to which this Court will look.

The Supreme Court of Oklahoma interprets Section 9574, C. O. S. 1921, to tax property which has an actual situs, a permanent abiding place, within the State.

In the language of this Court in *Coe* v. *Errol, infra,* in considering the right of a State to subject to taxation all personal property having an actual situs within its borders, "It is hardly necessary to cite authorities on a point so elementary."

> "The right of the State, in which personal property is situated, to tax it, is not affected by the fact that the owner resides in another State, which taxes him for the same property as a part of his general estate attached to his person. *Coe* v. *Errol,* 116 U. S. 517."

To the same effect:

Pullman's Palace Car Co. v. *Pennsylvania,* 141 U. S. 18.

St. Louis v. *Wiggins Ferry Co.,* 11 Wall. 423.

Savings & Loan Soc. v. *Multnomah County,* 169 U. S. 421.

Frick v. *Pennsylvania,* 268 U. S. 473.

The Supreme Court of Oklahoma found the actual situs to be in Pawnee County and the property, for that reason, there taxable in accordance with Sect. 9574, C. O. S. 1921. Surely this Court will not, in considering jurisdiction, go behind that finding of fact on the part of the State Court.

> "As to whether a tax is in accordance with a law of a State, the decision of the highest Court of a State is conclusive." *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 23.
>
> "We said in *Champion Lumber Co.* v. *Fisher,* 227 U. S. 445, 451, 33 Sup. Ct. 329, 57 L. Ed. 591, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its validity. See, also, *Foreman* v. *Meyer,* 227 U. S. 452, 33 Sup. Ct. 331, 57 L. Ed. 594. If there be no dispute about the facts, *Hyatt* v. *People ex rel. Corkran,* 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, might apply. And necessarily the same principle and comment are applicable when there is drawn in question the validity of a statute of or authority exercised under a state." *Ireland* v. *Woods,* 246 U. S. 323.

The appellant's contention of the unconstitutionality of Section 9574, C. O. S. 1921, was not urged upon the Trial Court nor upon the State Supreme Court.

WHEREFORE, for the reasons afore set forth, appellee respectfully moves the court to dismiss this appeal for lack of jurisdiction.

J. BERRY KING,
Attorney General of the State of Oklahoma.
F. M. DUDLEY,
Assistant Attorney General.
W. T. CLEETON,
County Attorney of Pawnee County,
State of Oklahoma.
ED. WAITE CLARK,
Special Counsel.

EXHIBIT "A."

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 23,218.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Pawnee County, State of Oklahoma.

Honorable L. N. Kimrey, Judge.

Affirmed.

No. 23,219.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Pawnee County, State of Oklahoma.

Honorable L. N. Kimrey, Judge.

Affirmed.

No. 23,342.

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY.

Error from the District Court of Pawnee County, State of Oklahoma.

Honorable Thurman S. Hurst, Judge.

Reversed and Remanded.

No. 23,334.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Osage County, State of Oklahoma.

Honorable Henry Wood, Judge.

Reversed.

SYLLABUS.

Where tank cars are owned by a refining company incorporated in a foreign state, but authorized to do business in this State, it having but one refinery and that located in this State and such tank cars are used by such company to transport refined products in intrastate and interstate commerce and all of such cars are returnable when empty to the refinery, all such cars are taxable as personal property of such corporation in the county where such refinery is located. None of such cars are taxable in another county merely because some of such cars are temporarily within such other county.

C. E. Mitchell, County Attorney of Pawnee County; Ed. Waite Clark, P. E. Rowe, R. K. Robertson, for Pawnee County.

C. K. Templeton, County Attorney of Osage County; Leander Hall, Frank T. McCoy, John R. Pearson, John T. Craig, for Osage County.

Chas. Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, for Johnson Oil Refining Company.

RILEY, *J.*:

Causes #23,218, and #23,219, originated in the County Treasurer's office of Pawnee County. They were begun by the Tax Ferrett. Appeals were taken to the County Court and tried there by stipulation upon the same evidence. The appeals here are separate. The County Court directed the entry upon the tax rolls of the taxable value of 380 tank cars owned by the Johnson Refining Company for the years 1925-28, inclusive. The taxable situs was found to be at Cleveland, Pawnee County, Oklahoma. From the County Court appeals were perfected to this Court.

Cause #23,342, originated in the Board of Equalization of Pawnee County. The Johnson Refining Company had listed for taxation for the year 1931, tank cars in the number 64. The Board upon notice assessed 381 such cars. The refinery appealed to the district court where a judgment was entered directing the taxation of what was found to be the average number of tank cars (64) situated in the County during the year. From that judgment both the County and the taxpayer have appealed to this Court.

These tank cars are engaged in interstate and intrastate commerce. By the use of them the Johnson Oil Refining Company transports refined petroleum products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this State. Occasionally the refinery purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked: "Johnson Oil Refining Company, Cleveland, Oklahoma", or "when empty return to Johnson Oil Refining Company, Cleveland, Oklahoma". The empty cars are, unless diverted by special order, as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland. This ac-

commodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other trackage at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. This company is incorporated under the laws of Illinois and maintains an office at Chicago, but no trackage for the cars is there. Cleveland is the one place where the company always has use for these cars. All of these cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products seem to be the result of sales contracts made from the office at Chicago. O. C. Goward is the superintendent of transportation for the refinery, whose location is Cleveland. The Cleveland office had control and supervision of these cars (R. p. 34, Cause #23,342). Empty cars are stored at Osage, Osage County, Oklahoma, and Parsons by the railroad company when congestion occurs. They are subject to order and return to Cleveland when needed. The need is communicated to the railroad each day (R. p. 35, Cause #23,342). No tax is paid on these cars in Oklahoma, and no *ad valorem* tax is paid upon them in Illinois (R. p. 4, Cause #23,342).

Section 9574, C. O. S. 1921, provides:

> "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that

despite the fact it listed for taxation in Pawnee County 64 cars during one of the years, it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation possesses but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. *Travis* v. *Dicky*, 96 Okla. 256, 222 P. 527; *State* v. *Timbrook's Est.*, 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. *Gulf Ref. Co.* v. *Tillinghast*, 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute "property within this State". They are merely temporarily absent at times from the Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars are taxable in Pawnee County. *Williamson* v. *Prairie Cattle Co.*, 5 Okla. 497.

The judgments of the County Court are affirmed.

There is no law authorizing a tax based upon an "average number" of cars present on a given day at any one taxable point, and there was no application of that principle by administrative officers.

The judgment of the District Court is erroneous as a matter of law. It is reversed with directions to render judgment directing a listing for taxation of the entire number of tank cars that have their base for operations within Pawnee County for the years involved.

There is another case herewith presented and considered on oral argument. It comes from Osage

County and is styled and numbered, In the Matter of Assessment of Omitted Property of Johnson Oil Refg. Co., #23,334. Therein Osage County is claiming the right to collect taxes upon 50 of the cars already considered. The judgment therein was based upon an "average number theory" and predicated upon the presence of that number of these cars upon the railway siding in possession of the railroad, subject to call from the refinery at Cleveland. In our opinion these cars did not have a permanent abiding place within Osage County and were not subject to taxation elsewhere than in Pawnee County.

The judgment in that cause is reversed with directions to dismiss the action.

Clark, C. J., Herner, Cullison, Swindall, McNeill, Kornegay, JJ., concur.

Lester, C. J., Andrews, J., absent.

This opinion, together with dissenting opinion of Swindall, J., on rehearing, not here attached, not yet officially reported, but reported in 19 Pacific, 2d Series, page 168.